U. S. S E N A T E

Republican Policy Committee

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President Clinton is Right

Federal Habeas Corpus Procedures Need Reform

On April 23, just days after the attack on the Oklahoma City federal building that left 168 dead, President Clinton appeared on CBS's "Sixty Minutes" and advocated reform of habeas corpus law. "I hope the Congress will pass a review and a reform of the habeas corpus provisions," the President said. "[I]t should not take eight or nine years and three trips to the Supreme Court to finalize whether a person in fact was properly convicted or not."

Beyond the sheer length of time that elapses between crime and punishment, many criticisms can be raised against the excesses of federal habeas corpus procedures. Here are five that were raised by former U.S. Attorney General William French Smith:

DOES NOT PROMOTE JUSTICE. Federal habeas corpus procedures are available to state as well as federal prisoners. Most murderers are state prisoners. The availability of habeas corpus to state prisoners has little or no value in avoiding injustices or ensuring that the rights of criminal defendants are respected. The typical applicant has already secured extensive review of his case in the state courts, having pursued a state appeal and often having initiated habeas proceedings in the state courts. The claims raised are normally without substance and are likely to be "technical," i.e., to allege procedural irregularities. ***Rarely do such claims cast any real doubt on the defendant's guilt.***

DEMEANS FEDERALISM. The present system of review is demeaning to the state courts and pointlessly disparaging to their efforts to comply with federal law in criminal proceedings. A single federal judge is frequently placed in the position of reviewing a judgment of conviction that was entered by a state trial judge, reviewed and found unobjectionable by a state appellate court, and upheld by a state supreme court. An independent determination of the contentions raised by the applicant is required of the federal judge even if he has no doubt that the state courts were conscientious and fair. State judiciaries are presumed to be incapable of applying federal law, or unwilling to do so.

DEFEATS FINALITY. The processes of federal habeas corpus defeat the important objective of having an end to a judicial proceeding. "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was

free from error but rather on whether the prisoner can be restored to a useful place in the community," wrote the late Justice John Harlan in 1971. "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

WASTES RESOURCES. At a time when both state and federal courts face staggering criminal caseloads, we can ill afford to make large commitments of judicial and prosecutorial resources to procedures of dubious value in furthering the ends of justice. Such commitments come at the expense of the time available for the stages of the criminal process at which the questions of guilt and innocence and basic fairness are most directly addressed. Former Chief Justice Warren Burger made these points:

> I know of no society or system of justice that takes such scrupulous care as we do to give every accused person the combination of procedural safeguards, free legal counsel, free appeals, free records, new trials and post conviction reviews of his case. I have seen cases — and this occurs in many courts today — where three, four, and five trials are accorded to the accused with an appeal following each trial and reversal of the conviction on purely procedural grounds. . . . In some of these multiple trial and appeal cases the accused continued his warfare with society for eight, nine, ten years and more. In one case more than 60 jurors and alternates were involved in five trials, a dozen trial judges heard an array of motions and presided over these trials; more than 30 different lawyers participated either as court-appointed counsel or prosecutors and in all more than 50 appellate judges reviewed the case on appeals. I tried to calculate the costs of all this for that one criminal act and the ultimate conviction. The best estimates could not be very accurate, but they added to a quarter of a million dollars [in 1970 dollars]. ***The tragic aspect was the waste and futility since every lawyer, every judge and every juror was fully convinced of the defendant's guilt from the beginning to the end.*** [25 *Record of the N.Y.C. Bar Assoc.* 14, 15-16 (Supp. 1970); emphasis added]

NULLIFIES CAPITAL SENTENCES. The constitutionality of the death penalty has been settled since 1976. Most states (38, in 1995) now authorize capital punishment, but the inefficiency of current court procedures has resulted in a *de facto* nullification of capital punishment laws. The "public interest" organizations that routinely involve themselves in capital cases have fully exploited the system's potential for obstruction by deferring collateral attack until the eve of execution. Once a stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years.

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[Source: This paper is an edited excerpt from the late William French Smith's article, "A Proposal for Habeas Corpus Reform," in P. McGuigan and R. Rader (eds.), *Criminal Justice Reform* (1983). Mr. Smith was Attorney General of the United States during President Reagan's first term. He died in 1990.]